United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

295

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1083

United States of America,

Appellee,

v.

Robert Freeman,

Appellant.

Appeal from the United States District Court
for the District of Columbia

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BRIEF FOR APPELLANT

Statement of Issues Presented

1. Whether Appellant, as a matter of law, should have been acquitted of the offense of carrying a dangerous weapon since the Government failed to establish that he did "carry" a pistol "openly or concealed," and that he did intend to so "carry" it.

2. Whether the District Court committed reversible error in failing to properly instruct the jury on the "carry" and "intent" elements of the offense of carrying a dangerous weapon (22 D.C. Code § 3204).

3. Whether, assuming that the conviction was proper, the sentence imposed was unduly severe under the circumstances.

* * * * * * *

This case has not previously been before this Court.

* * * * * * *

REFERENCES TO PARTIES AND RULINGS

Appellant was tried before United States District Judge William B. Jones and a jury on October 21 and 22, 1970. The verdict is recorded at pages 108-10 of the transcript of October 22nd. Appellant was sentenced by Judge Jones on January 15, 1971, as reported in the transcript of that date.

STATEMENT OF THE CASE

Appellant Robert Freeman was indicted July 21, 1970 on a single count of violating Title 22, Section 3204 of the D.C. Code. The indictment charged that, on or about May 18, 1970, Freeman did carry "openly and concealed on or about his person . . . a dangerous weapon capable of being so concealed, that is a pistol, without license therefor issued as provided by law." Freeman was tried in the United States District Court,[1/] and on October 22, 1970, the jury returned a verdict of guilty (II Tr. 108-10).[2/] On January 15, 1971, the Court sentenced Freeman to nine months to three years in jail.

The facts and circumstances pertaining to the charged offense are as follows:

At the time of his arrest (May 18, 1970), Appellant Robert Freeman was working the evening shift (5 p.m. to 2 a.m.) at a restaurant in Adelphi, Maryland (II Tr. 8-9).

1/ Because of a prior conviction, the offense charged became a felony (22 D.C. Code § 3204) and thus was tried in the District Court.

2/ The transcript is paginated separately for the two days of the trial. "I Tr." will be used for references to the first day's transcript; "II Tr." for references to the second day's transcript. The sentencing transcript (January 15, 1971) will be referred to as "III Tr."

Sunday was Freeman's regular payday, Monday was his day off (II Tr. 9, 14). On Sunday, May 17, 1970, Freeman worked his shift and was paid $70.00, after taxes, for his week's work (II Tr. 14-15, 30). He had no money when he started to work on Sunday (II Tr. 15).

Upon returning to his Washington, D.C. residence[3/] early Monday morning, Freeman "stayed up all night" drinking with a buddy who lived at the same address (II Tr. 15-16). After the sun came up, Freeman continued his drinking with 7 or 8 friends gathered at a low wall next to an alley (II Tr. 16, 30-31). The alley ran between Corcoran and R Streets, N.W. (II Tr. 13). This group frequently gathers at this wall; each person contributes what he can to buy liquor for the entire group (II Tr. 16). On this occasion -- Monday May 18, 1970 -- Freeman "was paying for most of" the liquor (II Tr. 16, 34). By the time of his arrest shortly before 11 p.m. that day, Freeman had about $23.00 left from his $70.00 in wages (II Tr. 22, 34). Around 5 - 6 p.m., Freeman left the alley wall, stopped drinking and returned home (II Tr. 16-17). There he was in the house and outside talking, "off and on" for four to five hours (II Tr. 17). At about 10:35 p.m., Freeman decided to walk up to Jimmie's

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3/ At the time Freeman lived in a rooming house at 1319 Corcoran Street, N.W. (II Tr. 7-8).

restaurant on 14th Street (II Tr. 17-18). He had not had anything to eat since a meal on the job Sunday evening (II Tr. 16, 17).

As Freeman approached the corner of 14th and R Streets on the way to Jimmie's, he met a man known to him only as "Tiny" (II Tr. 19, 23-24). Freeman knew the man because he ("Tiny") at times bought drinks for the alley wall group (II Tr. 24-25). The man asked where Freeman was going (II Tr. 19). When Freeman indicated he was going to eat at Jimmie's restaurant, the man said: "I want you to hold this for me until I come back, and by the time you finish eating . . . I'll be there to pick it up" (ibid.). With that, the man slipped a pistol into Freeman's rear pocket (II Tr. 19-20, 28, I Tr. 8, 26). Freeman felt the pistol through his trousers, realized what it was, but did not touch or handle the gun (II Tr. 19, 21, 32).[4/] When Freeman told the man to "hurry up", he replied, "Well by the time you [Freeman] finish eating, I'll be back . . . You buy a pack of beer and I'll pay for it when I do get back" (II Tr. 19, 26). The man ". . . said he was coming right back. So [Freeman] . . . figured he'd be back in about fifteen or twenty minutes" (II Tr. 28-29). Freeman

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4/ He did not even think to check to see if the gun was loaded (II Tr. 33-34).

admitted that he did not affirmatively object to the man's slipping the pistol in his pocket (II Tr. 28). However, he testified that ". . . at the time, I wasn't even thinking no way. At the time, I had been woke all that time and had been drinking all that time, I just wasn't thinking" (II Tr. 27). When asked what was going through his mind, Freeman answered: "Nothing, I just thought I was, myself, doing some kind of favor" for the man (II Tr. 20-21). The inclination to do "some kind of favor" resulted "mostly" from the man's buying drinks for the alley wall group, and perhaps from his promise to buy beer at Jimmie's (II Tr. 26-27). This was the only time Freeman had "held" a gun for anyone (II Tr. 29-30).

The man ("Tiny") who slipped the pistol to Freeman also carried a brown, paper bag which attracted the attention of Police Officers Clark and Powell (I Tr. 8-9, 19, II Tr. 28). The Officers were turning the corner of 14th and R Streets, N.W. in a scout car when they observed the man with Freeman ". . . trying to turn himself to shield the bag" (I Tr. 9, 22). They pulled the scout car over to investigate; and "[t]he minute we stopped, opened the cruiser door to get out, then the other defendant [sic] took off down an alley" (I Tr. 8-9, 19, 22). The Officers did not

pursue this man,[5] but did approach Freeman, who ". . . was still standing there" (I Tr. 19).[6] Then they noticed the pistol in Freeman's pocket, recovered it, and placed Freeman under arrest (I Tr. 23). Freeman did not try to flee or resist in any way (I Tr. 23).

The total time of this incident was very brief. Freeman testified that "forty-five seconds, or less" elapsed between the placing of the gun in his pocket and the arrest by the Police Officers (II Tr. 20). And, according to Officer Powell, there were only 15 to 30 seconds between the Officers' sighting the other man and their arrest of Freeman (I Tr. 23-24).

The Officers asserted that they told Freeman he was arrested for "CDW, gun" (I Tr. 20, II Tr. 43), and "advised him of his rights" (I Tr. 8). Freeman was under the impression he had been arrested for "drunkeness;" it was not until the next morning in the cellblock that he understood the gun charge (II Tr. 21-22). The record does not show when Mr. Freeman finally got something to eat.

The pistol the Officers recovered from Freeman was introduced into evidence (Government Exhibit 1) along

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5/ Officer Powell did radio for help and a search of the area was apparently made later that night (I Tr. 19, 22, 15-16). The man who fled was not apprehended (I Tr. 15, 24).

6/ Specifically, Freeman was standing on the public sidewalk (I Tr. 21, II Tr. 29).

with five "supervel" shells taken from its chamber (Government Exhibit 2). The pistol was test fired (I Tr. 11-12), but was not examined for fingerprints (I Tr. 15, 23). The cost of such a pistol, new, was estimated to be $60.00 to $70.00 (I Tr. 24-25).

At the trial, the Government's case consisted of the testimony of Officers Clark and Powell (I Tr. 6-26, II Tr. 42-43). Appellant Freeman testified on his own behalf (II Tr. 5-35).[7/] There was no dispute that: (1) the pistol recovered from Freeman's pocket is a dangerous weapon, (2) that the sidewalk on the corner of 14th and R Streets is a public place (not a house, place of business or other land possessed by Freeman), and (3) Freeman had no license to carry a pistol in the District of Columbia (I Tr. 27). However, the Government failed to establish two essential elements of the § 3204 offense of carrying a dangerous weapon: (1) that Freeman had contact with the pistol sufficient to constitute "carry[ing it] openly or concealed" on his person, and (2) that Freeman intended to so "carry" the pistol during his 45-second involvement with it.

Appellant contends that the record is critically deficient on these two elements, and that, as a matter of

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7/ The testimony of a character witness called on Freeman's behalf was stricken (II Tr. 42).

law, the record will not support Freeman's conviction on the § 3204 offense. In addition, Appellant contends that the District Court Judge failed properly to instruct the jury as to the law governing this offense, and that his failure constitutes reversible error. These issues were presented to the lower court by defense counsel's motion to dismiss (II Tr. 44), and by his request for special instructions (II Tr. 45-48). The denials of the motion and the request raise the issues for this appeal. Finally, Appellant submits that, even assuming a valid conviction was obtained, the nine months to three years sentence imposed on Freeman is unduly harsh in light of the minimal, accidental nature of the incident and the absence of any evidence that Freeman represents a danger to society.

ARGUMENT

The offense of carrying a dangerous weapon as defined in 22 D.C. Code § 3204[8/] ". . . is a serious matter in a troubled metropolitan area." Epperson v. U.S.,

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8/ "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed."

125 U.S.App.D.C. 303, 305 (1967), 371 F.2d 956, 958. Appellant recognizes that § 3204 was intended to ". . . strengthen rather than supplant existing law and to provide 'tighter controls over the possession of dangerous weapons.' " U.S. v. Shannon, 144 A.2d 267, 268 (D.C. Mun. App. 1958). See also Cooke v. U.S., 107 U.S.App.D.C. 223, 225 (1960), 275 F.2d 887, 889. Outlawing the wrongful possession of dangerous weapons has the important purpose of "suppress[ing] the act or practice of going armed and being ready for offense or defense in case of conflict with another," and thus minimizing danger to public safety. 94 C.J.S. Weapons § 2f. Appellant submits that § 3204 should be construed to implement this sound social objective, and not to unjustly punish those inadvertently caught up in trivial contacts with a weapon. More specifically, Appellant submits that the "serious" evil underlying § 3204's enactment does not encompass Robert Freeman's tangential, 45-second involvement with a pistol on May 18, 1970.

A. As a matter of law, Appellant should have been acquitted of the offense of carrying a dangerous weapon since the Government failed to establish two essential elements of the offense.

Quite clearly ". . . the burden is on the government to prove all of the necessary elements of the crime." U. S. v. Collier, 381 F.2d 616, 619 (6th Cir. 1967), cert. denied 390 U.S. 1043 (1968). As noted above, the Government here did prove three aspects of § 3204 violation -- a dangerous weapon, in a public place, and no license. But it failed to establish two very essential elements of the offense: (1) an unlawful "carry[ing]" of the pistol "openly or concealed" on Freeman's person and (2) an intent to so carry the pistol. Lacking these two elements, the conviction cannot stand as a matter of law.

1. The facts fail to show that Appellant did "carry" the pistol "openly or concealed" on his person. (II Tr. 15-21, 26-29, 32-34)

The uncontradicted facts show that Freeman had very minimal contact with the pistol recovered upon his arrest. The other man hurriedly slipped the pistol into Freeman's rear pocket where it stayed for forty-five seconds, or a minute at the most (II Tr. 19-20, 28). The man had asked Freeman to take the gun with him to Jimmie's

restaurant where the man was "coming right straight back" to pick it up (II Tr. 28-29, 19, 26). Freeman reasonably expected that this meant about 15 to 20 minutes (II Tr. 29). During the few seconds the pistol was in his pocket, Freeman did not even touch the weapon except to feel it through the cloth (II Tr. 19, 21, 32). Moreover, Freeman ". . . wasn't even trying to hide the gun" (II Tr. 21).[9/]

This minimal, accidental involvement with another man's pistol is hardly the type of open or concealed "carry[ing]" that § 3204 was designed to punish. Courts have recognized that more substantial contact and control is needed for the offense of carrying a dangerous weapon. Thus, in State v. Underwood, 109 S.E. 609, 610 (W.Va. 1921), the Court held that a similar statute ". . . contemplates some possession of the weapon more or less permanent in its character, and not simply a possession for such a casual purpose

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9/ While the statute reads in the disjunctive ("openly or concealed"), the indictment is limited to carrying a concealed weapon. Thus, it was charged that Freeman "did carry, openly and concealed . . . a dangerous weapon capable of being so concealed, that is, a pistol" (emphasis supplied). Unlike Kendrick v. U.S., 99 U.S.App.D.C. 173, 176 (1956), 238 F.2d 34, 37, there was no showing here that Freeman did conceal the pistol. There is only a suggestion by one of the police officers that Freeman tried to hide or get rid of the gun when they approached (I Tr. 26). This is hardly enough to establish the requisite concealment to support the indictment.

as was attempted to be shown here -- in other words, a possession of the weapon indicating an intention to control its use for at least a short time." In Wallace v. State, 200 S.W. 836 (Tex. 1918), the defendant held a gun for a few minutes at the request of another who was going to a social gathering. The Court succinctly held that ". . . this does not show an unlawful carrying of the pistol." Ibid. In short, the law recognizes that not every contact with a weapon is punishable as a "carrying." To have a pistol "temporarily and incidentally" does not rise to the level of criminal conduct. People v. LaPella, 4 N.E.2d 943 (N.Y. 1936).[10/] Under this legal standard, Freeman's brief brush with another man's pistol cannot be condemned as an unlawful "carry[ing]" under § 3204.

2. The facts fail to show that Appellant intended to unlawfully "carry" a pistol on his person. (II Tr. 15-22,26-34, I Tr. 24)

The uncontradicted evidence is that, at the time of his arrest, Freeman had been without food for at least

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10/ And see, 94 C.J.S. Weapons § 4: "In order to constitute the offense of carrying weapons without a license, however, it seems that the possession of the weapon must continue for at lease some appreciable time."

21 hours[11] and without sleep for at least 31 hours.[12] In addition, he had been drinking throughout the preceding night and most of the day (II Tr. 16-17). It was in this physical and mental condition that Freeman failed to object to the other man's placing the pistol in his pocket (II Tr. 27-28). At the trial, Freeman testified that he "should have" objected (II Tr. 28). But, he also recalled that at the time he was not thinking "no way," and that he "had been woke all that time and had been drinking all that time" (II Tr. 27). The only explanation he could come up with at the trial was that he was doing the man "some kind of favor" (II Tr. 20-21, 26-27). Given the 45-second character of the occurrence, it is evident that Freeman's mind was near total blank at the time the pistol was shoved into his pocket. Clearly there was no knowing, purposeful intent to carry a dangerous weapon.

It is true that no special criminal intent (intent to wrongfully use the weapon) is required for the § 3204 offense. Cooke v. U.S., 107 U.S.App.D.C. 223, 225

11/ Freeman testified that the last time he ate was ". . . before I left the job," 2 a.m. Monday morning (II Tr. 16, 17). The arrest occurred shortly before 11 p.m., Monday (I Tr. 7).

12/ Freeman left for work at 4 p.m. Sunday (II Tr. 8) and stayed up on his return Monday morning (II Tr. 15).

(1960), 275 F.2d 887, 889; U.S. v. Shannon, 144 A.2d 267, 268 (D.C.Mun.App. 1958). However, the Government must prove that Freeman had sufficient mental awareness and intent to "do the prohibited act." 94 C.J.S. Weapons § 5a. At the very least, the Government was required to show that Appellant ". . . intended to place the weapon where it was placed." People v. Foster, 178 N.E.2d 402, 405 (Ill.App. 1961). Moreover, the courts in a variety of situations have recognized the defense of "innocent" carrying of weapons. Thus, ". . . it is not unlawful to have or carry a prohibited weapon with a harmless or legitimate purpose or motive . . . . The purpose being an innocent one, the carrying of a prohibited weapon as a mere incident of its transportation from one place to another is not an offense." 94 C.J.S. Weapons § 5b. In other words, the offense is not established by mere possession or the ". . . physical handling of the prohibited weapon alone. In a strong line of cases the statute has been construed as accommodating many varieties of innocent possession, and the jury should have been instructed accordingly." People v. Furey, 217 N.Y.S.2d 189, 192 (App.Div. 1961). See also, State v. Underwood, supra, and Wallace v. State, supra. The fact that the"varieties" of innocent possession in these authorities differ from that present here does not detract from the soundness

of the principle and its relevance to this case.

Freeman very clearly had an innocent or harmless intent. If thinking at all, his only purpose in not objecting to the pistol was to do a short, miniscule "favor" for the other man. This is a far cry from the "act or practice of going armed and being ready for offense or defense" (94 C.J.S. Weapons § 2f) that § 3204 was designed to curtail. The conviction is an unjust misapplication of the statute.

B. The District Court committed reversible error in failing to properly instruct the jury on the "carry" and "intent" elements of the offense of carrying a dangerous weapon. (II Tr. 44-48,68-70)

While "a party has no right to insist that instructions be always couched in his own language," he does have the right to instructions that correctly and clearly set forth the applicable law. Leftwich v. U.S., 251 A.2d 646, 649 (D.C.App. 1969); Ramey v. U.S., 118 U.S.App.D.C. 355, 356-357 (1964), 336 F.2d 743, 744-745. In addition to the elements of the offense, the defendant is entitled to an instruction on his defense of "innocent" possession or carrying. See People v. Furey, 217 N.Y.S.2d 189, 191-192 (App.Div. 1961); People v. Harmon, 180 N.Y.S.2d 939, 942 (App.Div. 1959); DeRouselle v. State, 325 S.W.2d 701 (Tex.Cr.App. 1957).

In the present case, defense counsel sought to have the following included in the instruction:

> "The prosecution must prove beyond a reasonable doubt that the defendant unlawfully intended to carry the pistol, either openly or concealed, in a public place and that the defendant's possession of the pistol was not excusable because such possession was temporary and innocent." (II Tr. 45-48).

This was denied (II Tr. 46). As a result, the instruction given failed to apprise the jury that "carry" does not, in its legal sense, include short, minimal contact with a weapon. It merely recited that "A weapon is carried or concealed on or about the person if it is located in such proximity of the person as to be convenient of access and within reach" (II Tr. 69) (emphasis supplied). The law clearly requires more than mere location; the time and character of the contact with the weapon are material elements to be considered by the jury. The jury was evidently confused by the Court's limited "carry" instruction. Thus, it brought back a request to clarify the word "carry," whether it was "synonymous with being in his pocket" or required more in the way of "travel" (II Tr. 102). While the Court's instruction (supra) was the source of this confusion, the Court indicated that it would merely repeat verbatim the inadequate instruction (II Tr. 102-103). And, rather than even attempt such "clarification," the Court accepted the jury's verdict of guilty at a time it was still operating under

the unclear instruction (II Tr. 108). This was plainly prejudicial error. People v. Harmon, 180 N.Y.S.2d 939, 942 (App.Div. 1959).

In addition, the Court erred in failing to adequately set forth Appellant's "innocent" possession defense. The Court correctly stated that the requisite "general intent" meant that the unlawful acts had to be ". . . done consciously and voluntarily and not inadvertently or accidentally . . . . An Act is done knowingly if done voluntarily and purposefully and not because of mistake, inadvertence, or accident" (II Tr. 69-70). However, rather than go on to fully explain the "innocent possession" principle and its "many varieties" (People v. Furey, supra), the Court next stated: "There is evidence in this case that the Defendant had been drinking. But even if the Defendant had voluntarily become drunk or intoxicated, that fact would be no defense to the crime of carrying a concealed weapon" (II Tr. 70). From this sequence of words, the jury was likely led to believe that the only possible innocent or harmless aspect of Freeman's contact with the gun was his "drinking," and that was not a legally recognized excuse. In fact, Appellant's harmless "holding" of the pistol is based on the entire set of surrounding circumstances: Freeman's lack of food and sleep, his drinking,

and the quick, hurried placing of the pistol in his pocket by another. To focus solely on the drinking and then reject that as a defense in effect eliminated any possibility that the jury would consider any "innocent possession" defense. This was clear prejudicial error.

In the event this Court does not direct an acquittal as a matter of law (Section A, supra), it should reverse the conviction because of the prejudicial instructions and remand for a new trial.

C. Assuming that the conviction was proper, the sentence imposed on Appellant was unduly severe. (III Tr. 3-6)

Should the Court find against Appellant on the arguments advanced above (Sections A and B), counsel requests the Court to rule that the sentence imposed on Freeman is unduly severe under the circumstances. As a general rule, ". . . the imposition of sentence is in the sound discretion of the District Judge." Wilson v. U.S., 118 U.S.App.D.C. 319, 321 (1963), 335 F.2d 982, 984. However, appellate review is available to correct abuse of that discretion, U.S. v. Wiley, 278 F.2d 500, 502-504 (7th Cir. 1960), or a failure to exercise it, Yates v. U.S., 356 U.S. 363, 366-367 (1958). Such a correction may take the form

of a reduction in sentence or a remand with instructions to reconsider an unduly harsh punishment. U.S. v. Wiley, supra; U.S. v. Moody, 371 F.2d 688, 693-694 (6th Cir. 1967). Cf. Wilson v. U.S., supra.

The facts of the present case indicate that the District Court's nine months to three years sentence should be corrected. At the very most, Freeman engaged in a technical violation of § 3204 for a period of 45 seconds. The person who aroused police suspicion was not Freeman, but the man who asked him to hold the gun. No useful, legitimate purpose would be served by Freeman's prolonged confinement. Mr. Freeman may be a member of the inner city's street society, afflicted with intermittent employment in low-paying jobs and a history of drinking behavior, but he is not a public menace. He does not pose a dangerous or criminal threat to the community. In the May 18 incident, Freeman was simply the victim of a strange, brief encounter with a man with a gun. Of this encounter and its "need" for punishment, Mr. Freeman speaks eloquently for himself:

> "Well, Your Honor, the only thing I can say this actually is a freak accident, this is. The only thing I can say that I ask for the mercy of the Court. Just promise the Court that I never be indulging in any crimes any more, whether it is intended or not intended.

> Just like when he gives me this gun, that was not intended, because I wasn't thinking at the time, just like I said. For the Court to give me leniency and everything, I think I will kind of straighten out." (III Tr. 5-6).

It is submitted that Appellant has already atoned for whatever "wrong" he did on May 18, 1970, and that, if the conviction is not overturned, the Court should remand the case to the District Court with instructions to suspend the remaining, unserved portion of his sentence.

CONCLUSION

It is submitted that Freeman's conviction should be reversed as a matter of law and the indictment dismissed. In the alternative, his conviction should be reversed and the case remanded to the District Court for a new trial with proper instructions. At the very least, the circumstances argue strongly for the suspension of the remainder of his sentence.

Respectfully submitted,

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May 4, 1971

CERTIFICATE OF SERVICE

A copy of the foregoing Brief for Appellant in Docket No. 71-1083 was mailed, postage prepaid, this 4th day of May, 1971 to the United States Attorney, United States Attorney's Office, United States Court House, Washington, D.C. 20001, Attorney for Appellee in Docket No. 71-1083.

Carl L. Taylor (by R.S.)
Carl L. Taylor
Attorney for Appellant in
No. 71-1083

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1083

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT FREEMAN, APPELLANT

Appeal from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN G. GILL, JR.,
GUY H. CUNNINGHAM, III,
Assistant United States Attorneys.

Cr. No. 1231-70

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III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Did the trial court err in instructing the jury on the elements of "carrying" and "intent" as they related to the charge of carrying a pistol without a license, after rejecting appellant's proposed instructions on those elements?

2. Did the government introduce sufficient evidence to establish that appellant "intentionally carried" a pistol without a license within the meaning of 22 D.C. Code § 3204?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1083

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT FREEMAN, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a one-count indictment filed July 21, 1970, appellant was charged with carrying a pistol without a license (22 D.C. Code § 3204). After a trial on October 21 and 22, 1970, before the Honorable William B. Jones and a jury, appellant was found guilty as charged. On January 15, 1971, appellant was sentenced to a term of imprisonment for nine months to three years. This appeal followed.

On May 18, 1970, at about 10:50 p.m., Metropolitan Police Officers J. H. Clark and James L. Powell while

on "crime patrol" observed appellant and another man standing on the corner of 14th and R Streets, N.W. (I Tr. 8, 18).[1] Noticing that appellant's companion appeared to be trying to conceal a paper bag, the officers alighted from their cruiser and approached the two men (I Tr. 19). The one who had been holding the bag ran from the scene and was not arrested, though his description and a request for assistance in apprehending him was broadcast by Officer Powell before he approached appellant (I Tr. 15, 19). Appellant remained on the corner, and, as the officers approached him, "he started trying to hide something or reach in back towards his right rear pocket" (I Tr. 19). A revolver handle was seen protruding from this pocket by both officers (I Tr. 8, 19), who then arrested appellant and recovered a fully loaded .38 caliber revolver (I Tr. 8, 20). This weapon was tested and found to fire satisfactorily (I Tr. 11) and was introduced into evidence after being identified at trial by both officers (I Tr. 11, 20, 27). It was stipulated at trial that appellant did not have a license to carry a pistol at the time of his arrest (I Tr. 27).

Appellant testified in his own behalf, giving a lengthy account of the events leading up to his arrest with the revolver. According to his testimony, he worked in a restaurant from 5:00 p.m. to 2:00 a.m. every day except Monday, his regular day off. He had been paid approximately $70 upon finishing work early Monday morning, and had spent the remainder of the night and most of the day on Monday drinking with his friends, paying for most of the drinks himself (II Tr. 15-16). He finished drinking about 5:00 or 6:00 p.m. and went home, where he remained until some time after 9:00 p.m. At that time he set out to get some supper, the first food

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[1] The transcript is paginated separately for each day of the proceedings. For convenience, we adopt appellant's system of reference: "I. Tr." refers to the transcript of October 21, 1970; "II Tr." refers to the transcript of October 22, 1970; and "III Tr." refers to the sentencing transcript of January 15, 1971.

he would have eaten since he finished working. While he was on his way to eat, he was stopped by an acquaintance[2] who slipped a gun in his back pocket and said, "I want you to hold this for me until I come back, and by the time you finish eating . . . I'll be there to pick it up" (II Tr. 19). He estimated that he had the gun in his possession for forty-five seconds or less before he was arrested. He claimed to have been under the impression that the arrest was for drunkenness until the following morning, when he was reminded that a gun had been taken from his pocket (II Tr. 21-22).

On both direct and cross-examination, appellant indicated that his purpose in holding the gun for Tiny was to do him a favor in return for the past occasions on which Tiny had bought him beer and a promise to buy him some beer that night. Appellant indicated that he was sure of his recollection of all the events about which he testified (II Tr. 22-23).

Officer Clark was briefly called in rebuttal by the Government. He indicated that he had advised appellant of the nature of the charges approximately ten minutes after the arrest. He also testified that he had been close enough to appellant to smell his breath and that, in his opinion, appellant was sober at the time of his arrest and did not appear to have been drinking at all (II Tr. 42-43).

At the close of all the evidence appellant's counsel[3] specifically disclaimed any reliance on a defense of drunkenness and submitted two written requests for instructions, one relating to the elements of the offense and the other summarizing the evidence in the case (II Tr. 45-48). The instructions drafted by appellant's counsel

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[2] Appellant stated that he knew this person only by the nickname of "Tiny," and the extent of their relationship was that on a few occasions Tiny had bought drinks for appellant and his friends (II Tr. 23-25). Tiny was the individual who fled when the police approached (II Tr. 33).

[3] Appellant is represented by different counsel on appeal.

were rejected after a full discussion, but several "standard" instructions which he also requested were given. There was no objection by either counsel to the charge as given (II Tr. 71). The jury requested clarification of the instructions on the element of "carrying" (II Tr. 102) but returned with a verdict before supplementary instructions could be given (II Tr. 108).

At sentencing there was no objection to the introduction by the government of a certified copy of appellant's prior conviction in the District of Columbia of carrying a pistol without a license. Appellant and his counsel acknowledged to the court that appellant had also been convicted in Virginia of carrying a concealed weapon (a knife) and breaking and entering (III Tr. 3, 5).

ARGUMENT

I. The trial court properly rejected appellant's proposed instruction on the elements of "carrying" and "intent," and properly instructed the jury on those elements as they related to the charge of carrying a pistol without a license.

(II Tr. 47, 57, 60, 67-70)

Appellant's trial counsel indicated that his closing argument would center around a claimed lack of intent (II Tr. 57), consistent with his theory of "innocent possession" (II Tr. 47), and he submitted a draft of an instruction encompassing that theory.[4] The trial court rejected appellant's proposed instruction[5] and delivered

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[4] The proposed instruction in its entirety was as follows:

> The essential element of the offense alleged in this case is defendant's carrying, either openly or concealed, a pistol without a license. The prosecution must prove beyond a reasonable doubt that the defendant unlawfully intended to carry the pistol, either openly or concealed, in a public place and that the defendant's possession of the pistol was not excusable because such possession was temporary and innocent.

[5] Also rejected was appellant's other proposed instruction, which contained a two-paragraph summary of the evidence and a third

a charge which included the "red book"[6] instruction on carrying a concealed weapon (II Tr. 68-69). The court also told the jury that the crime charged required only a general intent and added, "Where this is so and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act." (II Tr. 69.) Although appellant did not rely on a defense of drunkenness, the court charged the jury on the point: "There is evidence in this case that the Defendant had been drinking. But even if the Defendant had voluntarily become drunk or intoxicated, that fact would be no defense to the crime of carrying a concealed weapon." (II Tr. 70.)

It is well settled that a party has no right to have the instructions given in the language of his own choosing, and that on appeal the crucial question is whether the instructions, as given, were wrong. *Agnew* v. *United States*, 165 U.S. 36 (1897); *Carter* v. *United States*, 138 U.S. App. D.C. 349, 427 F.2d 619 (1970); *Ramey* v. *United States*, 118 U.S. App. D.C. 355, 336 F.2d 743, *cert. denied*, 379 U.S. 840 (1964); *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948). Even more basic, we submit, is the proposition that a party has no right to an erroneous instruction. It clearly is not the law in the District of Columbia, despite the contrary suggestion in appellant's proposed instruction, that the government in prosecuting a charge of carrying a pistol without a license must assume the burden of negating an "innocent possession." Indeed, there seems to be no authority in this jurisdiction that an "innocent possession," as that term is used by appellant, would even be an affirmative defense to such a charge.

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paragraph concerning the weight to be accorded the testimony of the defendant. The substance of the third paragraph, however, was given by the court (II Tr. 67).

[6] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 65 (1966).

Thus, even in cases where there was a substantial showing of a reasonable fear of danger, this Court has held that an anticipated need to have a weapon available for self-defense does not preclude conviction for carrying a pistol without a license. *Cooke* v. *United States*, 107 U.S. App. D.C. 223, 275 F.2d 887 (1960); *Dandridge* v. *United States*, 105 U.S. App. D.C. 157, 265 F.2d 349 (1959). The case of *Wilson* v. *United States*, 91 U.S. App. D.C. 135, 198 F.2d 299 (1952), is not to the contrary. In *Wilson* this Court held that it was error to instruct a jury, "If you find . . . that he had in his hand a loaded pistol . . . then he is guilty," where the evidence showed that Wilson had fired the gun in self-defense and had not gone to his car to obtain the pistol until after he was beset by assailants.[7]

Appellant's theory of "innocent possession" appears to be bottomed on an even less substantial foundation than the self-defense claim rejected in *Cooke* and *Dandridge* and limited in *Wilson*. He made no argument that he had a need, either potential or actual, to possess a pistol, but now argues merely that he lacked any intent to do wrong.

It is clear that 22 D.C. Code § 3204 defines a general intent crime and that no intent, beyond the intent to do the acts which constitute the carrying of a weapon, need be proved. *Cooke* v. *United States*, *supra*. The legislative history of § 3204 makes it clear that Congress purposely eliminated from the prior statute the requirement that the gun be carried with intent to use it illegally when it enacted what is substantially the present 22

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[7] This Court did not indicate that no conviction of Wilson was possible; it merely stated that the issue should have been framed for the jury in terms of whether the pistol was within easy access of Wilson *before* he was actually attacked and had to use it in self-defense. As was made clear in *Cooke*, *supra*, the rationale of *Wilson*, namely, that one is not guilty of carrying an unlicensed gun during the period in which it is actually used in self-defense, "is inapplicable when one anticipating harm carries a gun for an hour or more before the actual danger arises." 107 U.S. App. D.C. at 224, 275 F.2d at 888.

D.C. Code § 3204 in 1932. For a full discussion of this legislative history, see *Cooke*, *supra*, 107 U.S. App. D.C. at 223 n.3, 275 F.2d at 889 n.3. In prosecutions for carrying a knife, also prohibited by § 3204, it has repeatedly been held that there need be no proof of an unlawful intent to use the knife, and that it was proper to deny requests for such instructions as not representing the law. *Leftwich* v. *United States*, 251 A.2d 646 (D.C. Ct. App. 1969); *Scott* v. *United States*, 243 A.2d 54 (D.C. Ct. App. 1968); *United States* v. *Shannon*, 144 A.2d 267 (D.C. Mun. Ct. App. 1958).

Appellant also urges that the court's instruction on the element of "carrying" was in error. The instruction on this point, that a weapon "is carried or concealed on or about the person if it is located in such proximity of the person as to be convenient of access and within reach,"[8] was part of the standard "red book"[9] instruction which the court gave. This definition was first enunciated by this Court in *Brown* v. *United States*, 58 App. D.C. 311, 30 F.2d 474 (1929), and has been followed ever since. Appellant stresses that the word "located" in that portion of the instruction gives no consideration to the character of the contact between appellant and the weapon. This emphasis, however, ignores the related instruction on the intent to do the proscribed act, which clearly did give the jury the duty to consider the character of appellant's contact with the weapon. Thus the instructions, in their entirety, permitted the jury to find appellant guilty if they found that he intentionally had a pistol on his person. The court correctly refused to instruct further on the specific intent and carrying theories advanced by appellant.[10]

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[8] II Tr. 69.

[9] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 65 (1966).

[10] To the extent that appellant argues that the court erred in accepting the jury's verdict before their written question as to whether "carry" required travel, rather than merely being in the

II. The government introduced sufficient evidence to establish that appellant "intentionally carried" a pistol without a license within the meaning of 22 D.C. Code § 3204.

(I Tr. 19; II Tr. 28-29, 66-67)

Appellant's factual arguments, challenging the sufficiency of the government's proof on the "intentional carrying" of the pistol, are predicated on his legal theory which we have discussed in the preceding section of our argument.[11] His motions for judgment of acquittal could properly have been granted only if there was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States* v. *Lumpkin*, D.C. Cir. No. 24,410, decided June 21, 1971, slip op. at 11; *Johnson* v. *United States*, 138 U.S. App. D.C. 174, 176, 426 F.2d 651, 653 (1970) *(en banc)*, *cert. dismissed as improvidently granted*, 401 U.S. —— (1971); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). Certainly under this standard both of appellant's motions were properly denied.

At the close of the government's case, the evidence showed that two policemen had seen appellant engaged in a transaction with another man which aroused their suspicions and that, on approaching, they recovered a fully loaded .38 caliber revolver from appellant's pocket after observing him apparently trying to hide it or reach for it (I Tr. 19). Appellant's testimony served only to

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pocket, we submit that the lesser burden—proof of mere presence in appellant's pocket—was all that the government had to meet. Accordingly, there was no error in accepting a verdict when the jury had indicated that it was going to apply at least that standard.

[11] They also rest on a total acceptance of appellant's version of the incident, a version which the jury could have rejected in its entirety in view of the rebuttal testimony of Officer Powell and the court's "*falsus in uno*" instruction. See II Tr. 66-67. In any event, even appellant's version of the facts supports his conviction.

buttress the government's case. He admitted that he had intended to hold the revolver for the owner until he returned (II Tr. 28-29). The only factual dispute in the record was whether appellant had been drinking heavily, but since drunkenness was not raised as a defense,[12] this dispute went only to credibility. In any event, all the elements of the offense had been admitted by appellant in his testimony. Even if his explanation amounted to a legal defense, his renewed motion for judgment of acquittal would have had to be denied since there was a basis for the jury to reject his version of the facts in its entirety.

We note that appellant places great emphasis on the fact that he allegedly possessed the revolver for only forty-five seconds. (See, *e.g.*, Appellant's Brief at 7, 8, 10, 14.) This emphasis is misplaced. The length of the possession was short only because the police intervened; appellant admitted intending to keep the weapon for at least fifteen or twenty minutes (II Tr. 29). In no case such as this, involving an arrest contemporaneous with the possession of a weapon, will the period of possession which the government is able to prove be longer than the time which necessarily elapses between the sighting of the weapon by the police and its seizure.

We submit that the facts shown by the government in its case in chief, as well as those admitted by appellant during his testimony, abundantly establish all the elements of the offense of carrying a pistol without a license in violation of 22 D.C. Code § 3204. Accordingly, appellant's motions for judgment of acquittal were properly denied.[13]

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[12] Intoxication, of course, could not be raised as a defense, since the crime for which appellant was on trial was one of general, not specific, intent. *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 131, 259 F.2d 943, 946 (1958), *cert. denied*, 359 U.S. 959 (1959); *see Parker* v. *United States*, 123 U.S. App. D.C. 343, 359 F.2d 1009 (1966).

[13] Appellant also challenges on this appeal the length of his sentence. The sentence imposed, nine months to four years, was

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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well within the statutory maximum. *See Barnett* v. *United States*, 131 U.S. App. D.C. 192, 403 F.2d 918 (1968). It is axiomatic that "in imposing a statutorily permissible sentence, a sentencing judge has a wide discretion which will not ordinarily be disturbed on appeal." *Leach* v. *United States*, 122 U.S. App. D.C. 280, 281, 353 F.2d 451, 452 (1965), *cert. denied*, 383 U.S. 917 (1966); *see Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932).

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